A

Lai Chooi v Ho Seng Kung & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1084–05 OF 2012
RAMLY ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER JJCA
26 JULY 2012

C

Civil Procedure — Limitation of action — Specific performance — Sale and purchase agreement — When cause of action accrued — Limitation period to bring action for recovery of land — Whether action time-barred — Limitation Act 1953 s 9(1)

D

Civil Procedure — Res judicata — Application for specific performance — Sale and purchase agreement — Earlier action comprising same facts, cause of action and prayers struck out under O 18 r 19(1)(b) of the Rules of the High Court 1980 — Whether action scandalous, frivolous, vexatious or under inherent jurisdiction of court — Whether there was res judicata — Whether appropriate case to be struck out

E

F

In the High Court, the plaintiff ('the appellant') sought against the defendants ('the respondents'), for the specific performance of a sale and purchase agreement ('SPA') dated 30 January 1997 and damages in lieu of the specific performance ('the said action'). Prior to the said action, there was an earlier action ('the earlier suit') filed by the appellant against the respondents based on the same facts and cause of action and seeking the same prayers. However, the earlier action was struck out and set aside as the writ had expired and was not validly extended. The respondents argued that the subject matter of the said action was previously determined or disposed of in the earlier suit and the said action was also time-barred. It was therefore submitted by the respondents that the said action was scandalous, frivolous, vexatious or under the inherent jurisdiction of the court. The respondents then proceeded to file an application under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('RHC') to strike out the appellant's action. In allowing the respondents' application, the High Court judge held that there was duplicity in filing the said action and the appellant was estopped from claiming the same relief as it was res judicata. Hence, the present appeal.

G

H

I

Held, allowing the appeal with costs of RM10,000:

(1) This was not an appropriate case to be struck out under O 18 r 19 of the RHC. The claim had not been determined yet on its merit. The earlier action was struck out without going into the merit of the case. The appellant was then entitled to file afresh if it was done within the limitation period. The appellant was clearly not estopped from claiming the same relief in respect of the land and the SPA in the present suit. The principle of res judicata was only applicable if the matter had been decided and determined on merit (see paras 7 & 12).

(2) The cause of action in the present action was essentially an action to recover land and for specific performance of an agreement for a sale of land. Under sub-s 9(1) of the Limitation Act 1953, the limitation period to bring an action for recovery of land is 12 years from the date of accrual of the cause of action. In the present case, the cause of action accrued on 27 June 1998. Thus, the 12 year limitation only set in on 26 June 2010. The present action was filed on 15 October 2009, well within the 12 year limitation period (see para 10).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, plaintif ('perayu') memohon terhadap defendan-defendan ('responden-responden'), untuk pelaksanaan spesifik perjanjian jual beli ('SPA') bertarikh 30 Januari 1997 dan ganti rugi sebagai ganti pelaksanaan spesifik ('tindakan tersebut'). Sebelum tindakan tersebut, terdapat tindakan terdahulu ('tindakan terdahulu') difailkan oleh perayu terhadap responden-responden berdasarkan fakta sama dan kausa tindakan dan memohon untuk permohonan yang sama. Walau bagaimanapun, tindakan terdahulu dibatalkan dan diketepikan kerana writ telah tamat tempoh dan dilanjutkan secara tak sah. Responden-responden berhujah bahawa perkara tindakan tersebut telah ditentukan sebelumnya dan didengar di dalam tindakan terdahulu dan tindakan tersebut juga telah dihalang masa. Oleh itu ia dihujahkan oleh responden-responden bahawa tindakan tersebut adalah bersifat skandal, remeh, menyusahkan atau di bawah bidang kuasa inherens mahkamah. Responden-responden kemudiannya meneruskan untuk memfailkan permohonan di bawah A 18 k 19(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan tindakan perayu. Dalam membenarkan permohonan responden-responden, hakim Mahkamah Tinggi memutuskan bahawa terdapat kependuan dalam memfailkan tindakan tersebut dan perayu diestop daripada menuntut relief yang sama memandangkan ia adalah res judicata. Maka, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Ini adalah bukan kes yang wajar dibatalkan di bawah A 18 k 19 KMT. Tuntutan belum lagi ditentukan atas meritnya. Tindakan terdahulu dibatalkan tanpa ditentukan merit kes tersebut. Perayu oleh itu berhak untuk memfailkan semula jika ia dilakukan dalam tempoh had masa. Perayu jelas tidak diestop daripada menuntut relief yang sama berkaitan tanah dan SPA dalam tindakan ini. Prinsip res judicata hanya boleh diguna pakai jika perkara telah diputuskan dan ditentukan atas merit (lihat perenggan 7 & 12).

(2) Kausa tindakan dalam tindakan ini pada dasarnya tindakan untuk mendapatkan semula tanah untuk pelaksanaan spesifik perjanjian jualan tanah. Di bawah sub-s 9(1) Akta Had Masa 1953, tempoh had masa untuk membawa tindakan untuk mendapatkan semula tanah adalah 12 tahun dari tarikh akru kausa tindakan. Dalam kes ini, kausa tindakan terakru pada 27 Jun 1998. Oleh itu, had masa 12 tahun hanya bermula pada 26 Jun 2010. Tindakan ini difailkan pada 15 Oktober 2009, dalam tempoh had masa 12 tahun (lihat perenggan 10).]

Cases referred to

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] MLJU 105, HC (distd)

Legislation referred to

Limitation Act 1953 s 9(1)
Rules of the High Court 1980 O 18 r 19, O 18 19(1)(b)

Appeal from: Suit No 22–1540 of 2009 (High Court, Shah Alam)

Mark Lau (Sreenevasan Young) for the appellant.
K Periasamy (P Selvaraj with him) (Raj & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] The appellant/plaintiff filed an action against the respondents/defendants seeking specific performance of a sale and purchase agreement dated 30 January 1997, damages in lieu of specific performance, consequential damages for destruction of structure of the property in question and costs.

[2] The respondents filed an application to strike out the appellant's action under O 18 r 19(1)(b) of the Rules of the High Court (RHC) 1980 on the premise that the said action was scandalous frivolous or vexatious; or under the inherent jurisdiction of the court. The grounds of the said application were that the subject matter of the said action, which was a dispute surrounding the sale and purchase agreement ('SPA') was previously determined or disposed of in an earlier suit and therefore res judicata; and the said action is also time-barred.

[3] The learned High Court judge allowed the said application on the grounds that there was duplicity in filing the said action and therefore it was an abuse of process of the court; and the appellant (the plaintiff) was estopped from claiming the same relief in respect of the land in question and the SPA as the same has been determined by the Court of Appeal and therefore res judicata.

[4] Dissatisfied with the said decision of the learned High Court judge, the appellant appealed to the Appeal Court. Hence the present appeal before us.

OUR FINDINGS

[5] Previously, there was an earlier action filed by the appellant against the respondents in 1998 based on the same facts and cause of action; and asking for the same prayers. The parties were the same. However the said action was struck out and set aside as the writ had expired and was not validly extended. The striking out decision was affirmed by the Court of Appeal on 9 April 2009. The appellant/plaintiff's application for leave to appeal to the Federal Court was withdrawn. The action was struck out only on the issue of the validity of the writ for the purpose of effecting service. It is not in dispute that the earlier action was struck out not on its merits, as the merit had not been determined yet by the court.

[6] The learned judge in her grounds of judgment (para 6) held as follows:

> [6] Dengan menggunapakai maksud res judicata di dalam kes Mahkamah Agung di atas mahkamah ini memutuskan plaintif telah diestop untuk menuntut relif yang sama atas hartanah dan perjanjian jual beli yang sama terhadap defendan-defendan yang sama yang mana telah diputuskan di Mahkamah Rayuan.

[7] Clearly the learned judge had come to a wrong finding of fact when she said 'yang mana telah diputuskan di Mahkamah Rayuan'. On records, the claim had not been determined yet on its merit. The earlier action was struck out without going into the merit of the case. The appellant is then entitled to file afresh if it is done within the limitation period. The appellant/plaintiff is clearly not estopped from claiming the same relief in respect of the land and the

SPA in the present suit. The principle of res judicata is only applicable if the matter had been decided and determined on merit.

[8] The learned judge also relied on the fact that there was duplicity in filing the present action and therefore, it was an abuse of process of the court. She cited the case of *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105 to support such finding. Our view is that the facts of that case are distinguishable from the facts of the present case. In that case there was a pending action of the same dispute when the second action was filed; while in the present case, when the present action was filed on 15 October 2009 the earlier action was struck out and set aside on 9 April 2009, and therefore there was no pending action at that material time of filing. Therefore the finding of duplicity by the learned judge is not supported by the facts of the case. There is no issue of duplicity in the present case.

[9] The issue of limitation was also raised by the respondents in this appeal; ie the appellant's action was time barred as it was filed more than six years after the cause of action arose. The learned judge however had not considered this issue in her grounds of judgment.

[10] Our view is that the cause of action in the present action is essentially an action to recover land and for specific performance of an agreement for a sale of land. Under sub-s 9(1) of the Limitation Act 1953 the limitation period to bring an action for recovery of land is 12 years from the date of accrual of the cause of action. It had been held by the Federal Court in the case of *Nasri v Mesah* [1971] 1 MLJ 32 that an action for specific performance of an agreement for the sale of land and for a declaration of title to land, is essentially an action to recover land, so that the period of limitation would be 12 years.

[11] In the present case, the cause of action accrued on 27 June 1998, being the last agreed date for completion of the relevant SPA (after the fifth agreed extension). Thus, the 12 year limitation only set in on 26 June 2010. The present action was filed on 15 October 2009, well within the 12 year limitation period.

CONCLUSION

[12] Based on the above considerations we are of the view that this is not an appropriate case to be struck out under O 18 r 19 of the RHC 1980. We

therefore allow the appeal with costs of RM10,000 to the appellant (here and below) and set aside the order of the High Court. We also make an order that the deposit be refunded to the appellant.

Appeal allowed with costs of RM10,000.

Reported by Afiq Mohamad Noor